

## BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on	)	
Its own motion, seeking to amend	)	
Title 291, Chapter 7, Transmission	)	
Lines Rules and Regulations, to	)	
adopt rules regarding wires cross-	)	Rule and Regulation No. 170
ing any railroad track at public	)	
highway crossings in the State of	)	
Nebraska in accordance with <u>Neb.</u>	)	
<u>Rev. Stat.</u> §§ 75-702 to 75-724.	)	

### COMMENTS OF LINCOLN ELECTRIC SYSTEM, OMAHA PUBLIC POWER DISTRICT AND NEBRASKA PUBLIC POWER DISTRICT

#### I. BACKGROUND AND SUMMARY OF POSITION

##### Background

On August 28, 2007, the Nebraska Public Service Commission ("Commission") issued an order ("Commission's Order") initiating a proceeding to amend its Title 291, Chapter 7, Transmission Lines Rules and Regulations, to adopt rules regarding wires that cross any railroad track at public highway crossings in the State of Nebraska. The Commission stated in its Order that it based its authority for the proposed regulations on Neb. Rev. Stat. §§ 75-702 to 75-724. The Commission's Order contained an Appendix that set forth proposed amendments to Title 291, Chapter 7, and invited written comments on the proposed amendments to be filed by October 12, 2007, which date was later extended to November 14, 2007. In accordance with the Commission's Order, Lincoln Electric System ("LES"), Omaha Public Power District ("OPPD"), and Nebraska Public Power District ("NPPD") jointly submit the following comments.

The City of Lincoln, Nebraska, is a municipal corporation existing pursuant to its home rule Charter and under the laws of the State of Nebraska. Lincoln Electric System ("LES") is

Lincoln's semi-autonomous municipal electric utility. Pursuant to Article IV, Sec. 25, of Lincoln's Charter, and Chapter 4.24 of the Lincoln Municipal Code, the Lincoln Electric System Administrative Board is assigned the responsibility for the control and management of the property, personnel, finances, facilities and equipment of LES. LES provides electric service to the cities of Lincoln and Waverly and to a portion of Lancaster County outside of those cities. LES serves approximately 126,500 meters, of which approximately 110,000 are residential and approximately 16,500 are commercial and industrial. The population served by LES is approximately 247,000 people.

OPPD, a public corporation and political subdivision of the State of Nebraska, provides electric service in a 13-county service area that includes the Omaha metropolitan area. OPPD's service area consists of approximately 5,000 square miles, with a population in excess of 700,000 people. OPPD owns and operates an extensive network of electric transmission and distribution lines to provide electric service to its customers.

NPPD also is a public corporation and political subdivision of the State of Nebraska providing electric service in 91 counties in Nebraska. NPPD owns and operates approximately 7,700 miles of electric transmission, subtransmission, and distribution lines in its service areas, to provide electric service to its customers.

### **Summary of Position**

LES, OPPD and NPPD negotiate and enter into wire crossing agreements with railroads in the regular course of their business. Each utility has experienced frustration and difficulty at times in the negotiation of these agreements, but usually can negotiate acceptable crossing arrangements with railroads. As the municipal electric utility of a City of the Primary Class, the City of Lincoln, d/b/a Lincoln Electric System, has the power of eminent domain. *See Neb. Rev.*

Stat. § 15-229. OPPD and NPPD also possess the power of eminent domain. *See Neb. Rev. Stat. § 70-670.* This eminent domain authority is derived from Article I, Section 21 of the Nebraska Constitution. Although the Commission's efforts to consider the regulation of wire crossing agreements are appreciated, LES, OPPD and NPPD believe that their ability to exercise the power of eminent domain, when necessary, is sufficient to address those situations when they cannot negotiate an acceptable and reasonable crossing agreement with a railroad. Accordingly, LES, OPPD and NPPD respectfully submit that the Commission should decline to adopt the proposed amendments to Title 291, Chapter 7 attached to the Commission's Order of August 28, 2007.

## **II. COMMENTS AND DISCUSSION**

### **Commission's Historic Regulation of Power Lines**

The Nebraska Legislature has granted the Commission limited jurisdiction over power lines. Chapter 75, Article 7 of the Nebraska Revised Statutes, authorizes the Commission to regulate power lines or other wires that cross "under or over any railroad track in this State at public highway crossings." *See Neb. Rev. Stat. § 75-702.* However, this authority does not extend to regulation of any line that is within the limits of any incorporated city or village. *See Neb. Rev. Stat. § 75-724.* Most of OPPD's and LES's wire crossings of rail lines are within the boundaries of municipalities and thus are exempt from Commission regulation. For this reason, the Commission's proposed rules would have somewhat limited applicability to the operations of OPPD and LES.

Historically, the Commission's regulation of power lines under Chapter 75, Article 7 of the Nebraska Revised Statutes has largely been a technical review to ensure conformity with the National Electrical Safety Code. For instance, the Commission's current regulations, at Title

291, Chapter 7, state that the 2002 edition of the National Electrical Safety Code "shall be the official rules of the Commission for the construction, operation, and maintenance of overhead and underground electric transmission lines, except when such rules and regulations conflict with the laws of Nebraska or the specific rules and regulations of the Commission." 291 NAC 7.001.01.<sup>1</sup>

In contrast to the limited technical review required under the Commission's current regulations, the proposed rules would regulate crossing agreements, in areas outside of incorporated municipalities, whenever the power line or other wires crossed railroad right-of-way at a public highway. "Public highway" is defined broadly in Section 003.06 of the proposed rules as "Any street, road, avenue, boulevard, or way which is publicly maintained or when any part thereof is open to the use of the public for purposes of vehicular travel."

#### **Experience With Wire Crossing Agreements**

LES, OPPD and NPPD negotiate and enter into wire crossing agreements with railroads as a regular part of their business. All three utilities have, at times, experienced difficulties in completing these agreements with railroads operating in Nebraska. One of the primary difficulties is the lack of timely response by the railroads. In addition, the utilities have experienced demands for excessive crossing fees, unnecessary insurance coverage, and requirements for indemnification. Generally, however, the three utilities have been able to successfully negotiate acceptable crossing agreements. In large part, this is due to the authority of these public utilities to initiate eminent domain proceedings to acquire rail crossing rights when necessary for the operation of their electric systems. LES, OPPD and NPPD believe that this authority is sufficient to enable them to complete necessary wire crossings, when an

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<sup>1</sup> We note that the Commission has revised its regulations to adopt the 2007 edition of the National Electrical Safety Code. The new regulations are awaiting approval by the Governor.

acceptable agreement cannot be reached with the railroad. Therefore, the three electric utilities prefer to maintain the status quo and respectfully submit that the Commission should decline to adopt the regulations set forth in the Appendix to its August 28, 2007 Order. If, however, the Commission decides to proceed with the proposed amendments to Title 291, Chapter 7, then the three utilities submit the rule should be revised to state that political subdivisions may utilize the process in their discretion, so that LES, OPPD and NPPD can continue to utilize their current practices, including, as necessary, the power of eminent domain.

#### **Additional Comments on Proposed Regulations**

Although, as noted, LES, OPPD and NPPD do not believe it is necessary or desirable to adopt the regulations proposed in the Commission's Order, the following additional comments are submitted for consideration by the Commission.

**First,** Section 003.05 of the proposed regulations states as follows:

003.05 Submission of Agreement to Commission: Any wire crossing agreement adopted by negotiation shall be submitted to the Commission. The Commission shall have thirty (30) days from the date of filing to approve or reject the agreement or the agreement will be deemed approved. The Commission may reject a wire crossing agreement if it finds that the wire crossing agreement is not in the public interest. If the Commission rejects the wire crossing agreement, it shall conduct a hearing and issue an order determining the terms, conditions and charges of the wire crossing agreement.

LES, OPPD and NPPD strongly object to the Commission asserting jurisdiction over voluntary wire crossing agreements. If the utility and railroad have been able to reach agreement, there is no reason for regulation by the Commission. Furthermore, the Commission's regulation of a voluntary agreement executed as part of a public utility's business operations would conflict with the statutory mandate that each utility is governed by its publicly elected board of directors or administrative board appointed by elected officials. These bodies are better equipped to

determine if a wire crossing agreement is in the best interest of the utility and its customer-owners. Indeed, the Commission's proposal to obtain authority to override voluntarily-negotiated agreements may contravene the prohibition on impairment of contracts contained in the federal and state constitutions. *See* U.S. Const. Art. I, Sec. 10; Neb. Const. Art. I, Sec. 16. In short, there is no legal or public policy reason for the Commission to assume regulatory jurisdiction over voluntarily-negotiated crossing agreements.

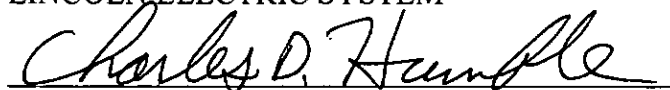
**Second**, although these commenters assert that the proposed regulations should not apply to them, we nevertheless wish to express our concern that the proposed regulations likely would not result in more expeditiously completed crossing agreements. Under proposed rule §003.04D2, a hearing could be set as late as six (6) months from the date of the initial petition, with another thirty (30) days thereafter for the Commission to issue an order that is then subject to appeal to the courts under the Administrative Procedure Act. This extended process would inhibit, rather than enhance, the ability of utilities to complete timely and reasonable crossing agreements. If the Commission elects to proceed with the regulations, these commenters suggest that the hearing clock begin to run with the filing of a notice by the utility of an impasse with the railroad on a crossing agreement, rather than within five (5) days of commencement of negotiations, as stated in Section 003.03 of the proposed rules. Upon such filing, a hearing date should be set within thirty (30) days, with a decision rendered by the Commission no more than thirty (30) days later. Thus, the entire administrative process could be completed within sixty (60) days.

### III. CONCLUSION

For the reasons addressed in these comments, LES, OPPD, and NPPD respectfully submit that the Commission should decline to adopt proposed Rule and Regulation No. 170 or exempt political subdivisions from its coverage.

LINCOLN ELECTRIC SYSTEM

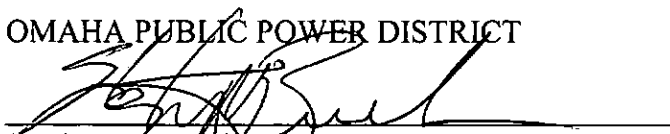
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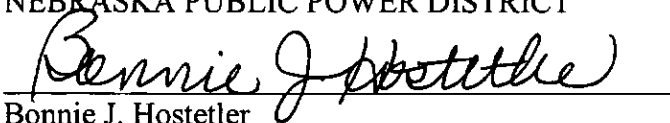
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